7-13-2015

"Nobody's Saying We're Opposed to Complying": Barriers to University Compliance with VAWA and Title IX

Charlotte Savino
Cornell Law School, cms483@cornell.edu

"NOBODY'S SAYING WE'RE OPPOSED TO COMPLYING"[1]: BARRIERS TO UNIVERSITY COMPLIANCE WITH VAWA AND TITLE IX

INTRODUCTION: PERVASIVE SEXUAL ASSAULT ON CAMPUSES

News of institutional mishandling of incidents of sexual assault at Hobart and Williams Smith,[2] Columbia,[3] Notre Dame,[4] Yale,[5] and the University of North Carolina at Chapel Hill[6] have brought the issue of sexual violence on college campuses[7] into the public discourse. President Obama, a father of two teenage girls,[8] together with Vice President Biden,[9] has authorized a task force[10] to investigate administrative procedures in higher education, launched a campaign to raise awareness,[11] and delegated additional rulemaking to the Department of Education.[12]

---

[1] Eric Kelderman, *College Lawyers Confront a Thicket of Rules on Sexual Assault*, CHRONICLE OF HIGHER EDUC. (June 25, 2014), available at http://chronicle.com/article/College-Lawyers-Confront-a/147349/ (quoting Dana Scaduto, general counsel at Dickinson College).

[2] Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, NY TIMES, July 13, 2014, at A1.

[3] Tyler Kingkade, *Columbia Students Bring Out Mattresses to Support Senior Emma Sulkowicz's Rape Survivor Project*, HUFFINGTON POST (Sept. 12, 2014, 2:56 PM), http://www.huffingtonpost.com/2014/09/12/columbia-mattress-emma-sulkowicz_n_5811030.html (last updated Sept. 13, 2014, 12:59 PM). *See also*, Callie Beusman, *23 Students File Complaint Against Columbia for Mishandling Rape*, JEZEBEL.COM, (April 14, 2014), http://jezebel.com/23-students-file-complaint-against-columbia-for-mishand-1567215473

[4] Melinda Henneberger, *Why I won't be cheering for old Notre Dame*, WASH. POST (Dec. 4, 2012), http://www.washingtonpost.com/blogs/she-the-people/wp/2012/12/04/why-i-wont-be-cheering-for-old-notre-dame/

[5] John Christoffersen, *Yale Under Federal Investigation for "Sexually Hostile Environment,"* HUFFINGTON POST (Apr. 1, 2011), http://www.huffingtonpost.com/2011/04/01/yale-title-ix_n_843570.html. *See also*, Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195 (2014) (describing media coverage of Yale settlement with the Department of Education).

[6] Vivian Ku & Michael Pearson, *U.S. to investigate UNC's handling of sex assault reports*, CNN (March 8, 2013, 9:25 AM), http://www.cnn.com/2013/03/07/us/north-carolina-chapel-hill-investigation/.

[7] This note uses the terms colleges, universities, schools, campuses, and institutions interchangeably to refer to the locations that Title IX and the SaVE Act address.

[8] FIRST LADY MICHELLE OBAMA, http://www.whitehouse.gov/administration/first-lady-michelle-obama (last visited Oct. 15, 2014).

[9] Vice President Biden and the Obama administration have been particularly active in campus sexual assault issues. *See* Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L. J. 143, n.6. Then-Senator Biden drafted the Violence Against Women Act in 1994. Alton J. Abramowitz, *VAWA Reauthorization May Fail to Protect the Most Vulnerable*, N.Y.L.J., (Feb 26, 2013).

[10] Establishing a White House Task Force To Protect Students From Sexual Assault, 79 FR 4385 (Jan. 22, 2014).

[11] Michael D. Shear and Elena Schneider, *Obama Announces 'It's On Us' Campaign to Combat Campus Sexual Assaults*, N.Y. TIMES, Sept. 19, 2014, http://www.nytimes.com/2014/09/20/us/politics/obama-campaign-college-sexual-assaults.html?_r=0. *See also* http://itsonus.org/.

[12] Memorandum from Lynne Mahaffie, Senior Director, Policy Coordination, Development, and Accreditation Service, "Implementation of Changes Made to the Clery Act by the Violence Against Women Reauthorization Act

The Obama Administration issued an overview on rape and sexual assault in January 2014 as part of its announcement of the White House Task Force to Protect Students from Sexual Assault (hereinafter Task Force).[13] The report states that one in five women (20%) has been sexually assaulted while in college.[14] With over eleven million women enrolled in post-secondary schools in the United States, the numbers of victims and the ramifications of these compliance laws are staggering.[15] The report also cites a seminal survey of male students that overturns the fundamental misconception that campus rape is primarily a misunderstanding between paramours: Of the 1,882 men questioned, 120 (6%) reported activity that amounted to rape, a majority of whom were repeat rapists, averaging six rapes each.[16] Despite, or perhaps because of, the pervasiveness of sexual assault on college campuses, only 12% of victims report to law enforcement.[17] In response to these numbers, the White House authorized the Task Force to (1) provide educational institutions with best practices for compliance,[18] (2) increase government enforcement, (3) improve transparency of government enforcement, (4) increase public awareness of institutional sexual assault compliance, and (5) enhance coordination among agencies in enforcement efforts.[19]

---

of 2013" (May 29, 2013), http://ifap.ed.gov/eannouncements/052913ImplementofChangesMade2CleryActViolenceAgainstWomenReauthorizationAct2013.html (referring to negotiated rulemaking process in 78 Fed. Reg. 22467).

[13] WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 1 (January 2014) [Hereinafter *Task Force*]. The report recognizes that the 20% figure is the cumulative percentage of women who were victims of forced penetration, raped under the incapacitation of drugs or alcohol, and attempted rapes. The figure does not account for the fact that some women may be victims of multiple forms of sexual violence.

[14] *Id.*

[15] U.S. Census Bureau, Table 226: "School Enrollment by Sex and Level: 1970 to 2009," available at http://www.census.gov/compendia/statab/2012/tables/12s0226.pdf.

[16] *Task Force, supra* note 13 at 2 (*citing* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 1, 73 (2002)).

[17] *Task Force, supra* note 13 at 14.

[18] Indeed, the 90-day report issued in April 2014 provides recommendations and requirements which are discussed below. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE (April 2014) [Hereinafter *Not Alone*].

[19] *Task Force, supra* note 13 at 5.

Urged by the Task Force to increase transparency,[20] the Department of Education released a list of colleges and universities that had pending Title IX sexual violence investigations conducted by the Office of Civil Rights (OCR) as of May, 2014.[21] This list includes prestigious public and private institutions such as the University of California – Berkeley, Amherst, Harvard (both the undergraduate college and law school), Dartmouth, Princeton, Swarthmore, Vanderbilt, and the University of Virginia among the fifty-five cited institutions.[22]

Laws governing higher education and the handling of sexual assault accusations have changed dramatically in the past year.[23] Under the Campus Sexual Violence Elimination Act (the "Campus SaVE Act"), starting in the 2013-14 academic year schools must add a host of safeguards designed to prevent sexual assault on campuses.[24] These new requirements include mandatory educational programming for incoming students, training for administrators involved in school hearings, more transparent policies regarding consequences for those found guilty, and improved means to protect victims from harassment in the interim between the complaint and final judgment.[25] This note explores the ambiguities and conflicts presented in these mandates as institutions of higher education look to comply with newly promulgated rules from the Department of Education.

---

[20] *Not Alone*, *supra* note 18 at 6.
[21] *U.S. Department of Education Releases List of Higher Education Institutions With Open Title IX Sexual Violence Investigations*, http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i, (May 1, 2014).
[22] *Id.*
[23] *See generally* Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195 (2014) (hereinafter Schroeder) (covering the need for and history of Title IX and the SaVE act and proposing implementation to better effectuate the goals of preventing sexual assault on campuses).
[24] Violence Against Women Reauthorization Act of 2013 (SaVE Act), Pub. L. No 113–4, §304 (March 7, 2013).
[25] *Id.*

Part I of this note will explore the government's action in addressing sexual assault on campus, including the history of VAWA, the Clery Act, and Title IX. Part II will posit barriers to compliance, including ambiguous mandates, due process issues of private adjudication, and privacy law. Part III encapsulates the current political landscape and the laws that are under consideration. Part IV concludes with the financial and legal consequences of university action and inaction, including lawsuits brought by victims, lawsuits brought by the accused, Department of Education and Office of Civil Rights fines, and admissions consequences as prospective students actively seek out newly mandated reports.

I. GOVERNMENT RESPONSE – UNDER- AND OVER-PROTECTION

The Clery Act[26] began as the Crime Awareness and Campus Security Act of 1990, which is part of Title II of the Student Right-to-Know and Campus Security Act of 1990.[27] The Crime Awareness and Campus Security Act tied federal funding to college and university reporting of crime statistics and security policies and procedures.[28] Congress amended the Act several times,[29] most notably in 1998 when it renamed it the Jeanne Cleary Disclosure of Campus Security Policy and Campus Crime Statistics Act.[30] The amendments clarified what schools had to report, in part by requiring schools to delineate the geographic boundaries (so called "Clery Geography"), mandated campus security to keep a crime log, and, among other provisions,

[26] 20 U.S.C. §1092(f) (2000).
[27] *See* Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61, 63 (2002).
[28] *Id.* at 68. The specific crimes to be reported were murder, rape, robbery, aggravated assault, burglary, and motor vehicle theft.
[29] The 1992 amendments required institutions to develop and distribute sexual assault policies, disciplinary procedures, law-enforcement notification procedures, and counseling and housing options. These amendments are part of the Campus Sexual Assault Victims' Bill of Rights Act of 1991 or the Ramstad Amendment. *Id.* at 69–70.
[30] *Id.* at 63.

authorized a $25,000 monetary sanction[31] in addition to the preexisting penalty of loss of federal financial aid for failure to comply.[32]

Congress first enacted the Violence Against Women Act in 1994.[33] In subsequent reauthorizations, Congress has focused legislative efforts on sexual assault on college campuses.[34] In the latest iteration of the law,[35] Congress added the Campus Sexual Violence Act (SaVE) Act, which expands reporting required under the Clery Act[36] to include incidents of domestic violence, dating violence, and stalking if the crime was reported to campus security police.[37] In addition, the SaVE Act requires universities to provide information to victims about counseling, the preservation of evidence, and options for restraining orders and no-contact protections.[38] The latest version of VAWA also requires institutions to create and publicize *ex ante* certain procedural and punitive rules: (1) the evidentiary standard, (2) equal access to student advocates for both the accuser and the accused, (3) a written lists of potential sanctions,

[31] The Department of Education has since raised the maximum fine to $35,000. CLERY ACT: THE BASICS, http://knowyourix.org/clery-act/the-basics/ (last visited Nov. 25, 2014).
[32] Fisher, *supra* note 27 at 70.
[33] Robin R. Runge, *Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L.J. 429, 431 (2013) (outlining the history of VAWA I). *See also* Jennifer Hagan, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 926, 970 (2001) (recounting the death of the civil remedy for VAWA I).
[34] VAWA 2000 expanded the conception of violence against women to cover domestic violence, sexual assault, child maltreatment, and stalking and included targeted efforts to combat dating violence, elder abuse, and violence against the disabled. The 2005 reauthorization included a focus on youth victims. Runge, *supra* note 33 at 432.
[35] *Supra* note 24.
[36] The Clery Act requires annual university reporting of criminal offenses that occur on campus or in specifically adjacent locations(to current and prospective students, employees, and the government. SUMMARY OF THE JEANNE CLERY ACT, http://clerycenter.org/summary-jeanne-clery-act (last visited Oct. 18, 2014).
[37] The VAWA amendments include reporting of incidents that were reported to campus police in addition to those that fall within the preexisting Clery geography (campuses, Greek housing and remote classrooms). Reporting expands beyond incident logs to include university policies and procedures in place to address sexual violence on campus. VAWA REAUTHORIZATION, http://clerycenter.org/article/vawa-amendments-clery (last visited Oct. 18, 2014). The text of the VAWA reauthorization, however, specifies only "a student or employee has been a victim . . . on or off campus." *Supra* note 24 at (C).
[38] American Council on Education, New Requirements Imposed by the Violence Against Women Reauthorization Act II(A), http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf (April 1, 2014).

and (4) available victim protections after a determination of rape.[39] The law requires that schools give notice to the accused at the time the allegation is made and at the final determination. Schools must train officials involved in sexual assault prevention and punishment on confidentiality and accountability.[40] These privacy practices must be memorialized in the institutional policies.[41] Lastly, incoming students and new employees must attend mandatory programming about community standards and sexual assault prevention.[42] Congress tasked the Department of Education with promulgating additional rules to clarify the compliance requirements in the reauthorization of VAWA.[43]

The Department of Education completed the notice and comment period of the VAWA reauthorization and released the final rules on October 20, 2014.[44] The final rules articulate the changes originally authorized by the 2013 reauthorization.[45] The Department of Education addressed thirteen points of clarification in the rule, explaining the reporting requirements, fleshing out the requirements of preventative programming, and addressing conflicts with other education laws like the Family Educational Rights and Privacy Act of 1974 (FERPA).[46] The amended rules do not go into effect until July 1, 2015,[47] although institutions are required to make good faith efforts to comport with the spirit of law until that time.[48]

---

[39] *Id.* at II(B). While the VAWA amendments do require the evidentiary standard be published, the law itself does not designate which standard is to be used. The 2011 OCR Dear Colleague Letter, however, uses the preponderance of the evidence standard. While that document is not positive law, it provides the enforcement standards for Title IX which is tantamount to mandating the lower evidentiary standard. Office for Civil Rights, Dep't of Educ., Dear Colleague Letter, 9 (2011), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [Hereinafter *2011 Dear Colleague Letter*].
[40] *2011 Dear Colleague Letter, supra* note 39.
[41] *Id.*
[42] *Id.* at III.
[43] Violence Against Women Reauthorization Act of 2013 (SaVE Act), Pub. L. No 113–4, §304 (March 7, 2013).
[44] Violence Against Women Act, 79 Fed Reg. 62,752, (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668).
[45] *See Id.*
[46] *Id.*
[47] *Id.*
[48] *Not Alone*, *supra* note 18 at 9 n.12.

Title IX overlaps with the goals of the SaVE Act insofar as it aims to prevent gender discrimination on college campuses by preventing and providing reporting mechanisms for sexual crimes.[49] The Department of Education is in charge of the interpretation and enforcement of Title IX, promulgating rules and releasing guiding materials in the form of Dear Colleague Letters.[50] The Department of Education has issued several non-binding Dear Colleague Letters in order to illuminate standards and expectations.[51] The Department's 2011 Dear Colleague Letter articulated the obligations of universities in complying with Title IX – most notably advocating for the preponderance of evidence standard for school adjudications of sexual violence.[52] Title IX requires that schools "[a]dopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints"[53] and requires a preponderance of the evidence standard in school proceedings.[54] These proceedings are themselves protected: Title IX discourages schools from promoting informal mediation in lieu of

[49] KNOW YOUR IX, *9 Things to Know About Title IX*, http://knowyourix.org/title-ix/title-ix-the-basics/ (last visited Oct. 19, 2014). Originally Title IX was meant to be a tool to combat sexual discrimination in education. Catherine Mackinnon's book equating sexual harassment to sex discrimination has made for a shift in understanding and a wellspring of well-settled law. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 n.10 and accompanying text (2013).

[50] For a concise overview of the Department of Education's role in Title IX compliance, *see* Chmielewski, *supra* note 9 at 147.

[51] *2011 Dear Colleague Letter*, *supra* note 39 at n. 1. "This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." For a critique of this quasi-rulemaking practice, *see* Robert Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?,* 41 DUKE L.J. 1311 (June, 1992).

[52] *2011 Dear Colleague Letter, supra* note 39. *See also*, Chmielewski, *supra* note 9 (arguing the lower evidentiary standard comports with other adjudications of civil rights violations). *But see*, Henrick, *supra* note 49 (arguing the evidentiary standard is one of a host of biased practices to favor convictions over Due Process considerations).

[53] *2011 Dear Colleague Letter*, *supra* note 39 at 6 (citing 34 C.F.R. §§ 106.8–106.9).

[54] "The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII . . . Like Title IX, Title VII prohibits discrimination on the basis of sex. . . . Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred)." *Id.* at 10–11.

a full formal hearing.[55] It also mandates protection from retaliation against the victim for reporting the assault – this in addition to enforcing no-contact and restraining orders.[56]

II. Barriers to Compliance

1. Ambiguous and Shifting Mandates

A. What Must Colleges Report?

The Clery Act and reporting mandates within the VAWA SaVE Act still leave gaps in reporting. Although it is clear that a university must report incidents that (1) occur on campus, (2) are reported to campus police, or (3) occur on designated off-campus locations,[57] there are a variety of ways that schools may learn of crimes that may or may not require additional reporting. Must the university compare reports with local police to determine if otherwise reportable off-campus crimes were investigated by a different police force? Must the institution report anything if it does not maintain its own security force?[58] The reporting requirement might be best served by expanding the mandate to include, but not be limited to, any crime committed against a student while enrolled. However, that expansion might create ambiguities for time at programs abroad, research semesters, and graduate students working and writing from a variety of off-campus locations. The Department of Education attempted to address these geographic issues in the comments to the rule.[59] The newly defined Clery geography includes all campus buildings and property, non-campus buildings and property, property immediately adjacent to

---

[55] *Id.* at 8.
[56] *Id.* at 15.
[57] Clery Act: The Basics, *supra* note 31.
[58] "Each institution participating in any program under this title, other than a foreign institution of higher education, that maintains a police or security department of any kind shall make, keep, and maintain a daily log, written in a form that can be easily understood, recording all crimes reported to such police or security department . . ." 20 USCS 1092 (f)(4)(A). The absence of a campus security force is not far-fetched, as it is contemplated in California Penal Code § 290.01 requiring registration of sex offenders.
[59] Violence Against Women Act, 79 Fed Reg. 62,752, 62755, 62,784 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668).

campus, and now areas within the jurisdiction of campus police, the latter clarified to mean property customarily patrolled by campus police.[60]

If a victim wishes to speak with an administrator about an incident, must that administrator report? If the administrator is a "responsible employee" then yes,[61] but how would the student – or even the employee herself – know of this reporting duty? Even after the 2014 significant guidance document "Questions and Answers on Title IX and Sexual Violence" attempted to clarify the responsible employee designation, questions remain.[62] In order to avoid the burden of listing every employee who must or must not report, some schools have read the responsible employee mandate to be so broad as to cover all faculty and staff with the limited exception of mental health counselors and student health staff.[63] This overzealous designation also serves to insulate universities from liability under the "known or should have known" standard in the 2011 Dear Colleague Letter.[64] The overbroad definition threatens to create a chilling effect on reporting as students may not wish to trigger the reporting mechanism or have

---

[60] *Id.*

[61] The Task Force created a chart for Cleary and Title IX compliance which explains, in part, that responsible employees must report incidents of sexual violence. "A responsible employee is any employee who has the authority to take action to redress sexual violence, who has been given the duty to report to appropriate school officials about incidents of sexual violence or any other misconduct by students, or who a student could reasonably believe has this authority or responsibility. Schools must make clear to all of its employees and students which staff members are responsible employees." However this definition itself is not straightforward. Intersection of Title IX and the Clery Act, https://www.notalone.gov/assets/ferpa-clerychart.pdf (last visited Oct. 19, 2014).

[62] John Gaal and Laura Harshbarger, *Responsible Employees and Title IX*, HIGHER EDUC. L. REPORT (May 12, 2014), http://www.higheredlawreport.com/2014/05/responsible-employees-and-title-ix/.

[63] For example, Cornell rule 6.4 articulates a duty of *all* faculty and staff to report possible sexual violations to appropriate channels in the university:

> Generally, faculty and staff members have a duty to consult with an appropriate university official when they become aware of potential violations under this policy such as sexual harassment, violence, or assault. These officials include the Title IX coordinator and deputy coordinators, the program manager for Inclusion and Compliance Initiatives, discrimination and harassment advisors, the CUPD, and local HR representatives.

Cornell University Policy Library, Policy 6.4, Prohibited Discrimination, Protected-Status Harassment, and Sexual Assault and Violence, p. 11 (Last Updated Nov. 7, 2013).

[64] Under the 2011 Dear Colleague Letter, a university has duty to investigate known incidents of sexual violence or incidents which the university should have known. The objective standard expands the scope of liability, increasing the cost to universities for keeping student confidences. *2011 Dear Colleague Letter*, *supra* note 39 at 4.

their confidences breached in the name of compliance.[65] Indeed, responsible employees must also make an effort to warn reporting students of the lack of confidentiality before the student reveals information.[66] This kind of Miranda warning could make students reconsider talking to faculty or other staff members at all, even those not under an obligation to report.

B. WHAT AND WHO CONSTITUTES A DISCIPLINARY BOARD?

In an effort to clarify the best practices for sexual misconduct policies, the Task Force has issued checklists and samples to educational institutions.[67] The checklist for a sexual misconduct policy is not meant "to provide schools with all the answers"[68] and indeed it does not. The checklist does not address who from the community should be on a disciplinary board nor how institutions should train them.[69] In fact, many schools do not have formal adjudication procedures at all[70] and if they do, only about half articulate internal standards for the composition of their disciplinary body.[71] The schools who report judicial board composition have a mixture

---

[65] Only in egregious circumstances are confidences breached but even those threshold circumstances are unclear. *See infra* part 3. *See generally* Violence Against Women Act, 79 Fed Reg. 62,752, 62762 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668) ("Institutions must balance the need to provide information to the campus community while also protecting the confidentiality of the victim to the maximum extent possible").

[66] Office of Civil Rights, Questions and Answers on Title IX and Sexual Violence, Page 23, April 29, 2014.

> Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands: (i) the employee's obligation to report the names of the alleged perpetrator and student involved in the alleged sexual violence, as well as relevant facts regarding the alleged incident (including the date, time, and location), to the Title IX coordinator or other appropriate school officials, (ii) the student's option to request that the school maintain his or her confidentiality, which the school (e.g., Title IX coordinator) will consider, and (iii) the student's ability to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (e.g., sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers).

[67] *Not Alone*, *supra* note 16 at 12.

[68] *Id.*

[69] Checklist of Campus Sexual Misconduct Policies, https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf (last visited Oct. 19, 2014).

[70] Karjane, H.K., Fisher, B.S., & Cullen, F.T., *Campus Sexual Assault: How America's Institutions of Higher Education Respond*. Final Report, NIJ Grant # 1999-WA-VX-0008. Newton, MA: Education Development Center, Inc. 105 (2002). The SAvE Act requires that schools publish their judicial procedures and possible sanctions. SaVE Act, Pub. L. No 113–4, §§ 304(8)(A)(ii), (8)(B)(ii) (March 7, 2013). Moreover, OCR guidance has required notice to students of grievance procedures as early as 2001. *2011 Dear Colleague Letter*, *supra* note 39 at n. 1 (citing 2001 Guidance). These laws show the importance of published procedure but also the low rate of compliance.

[71] *Id.* at 115.

of faculty, administrators, and judicial or disciplinary officers.[72] This mixed population presents challenges for required training as the sophistication and experience varies widely between these groups. Moreover, there is an inherent conflict of interest that prevents board members from being truly independent.[73] Administrators overseeing the disciplinary process may have latent or subconscious bias to minimize the reporting consequences of a decision against the accused.[74]

Many schools chose to have students serve on disciplinary panels in order to balance these biases.[75] As of 2002, as many as 80% of institutions of higher education that reported disciplinary panel composition included student representatives on adjudication panels.[76] Recently, colleges and universities have decided to remove student input[77] in rape cases because the Office of Civil Rights discourages policies that allow students to serve on disciplinary panels that hear sexual assault cases.[78] Although "discouraging" is not an outright proscription, OCR does mandate removal of student from judiciary panels when issuing resolution agreements.[79] This kind of enforcement threat encourages schools to proactively remove students from hearing

---

[72] *Id.*
[73] *See* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1606 (Dec. 2014). "…[A]dministrators overseeing the process are not truly serving autonomously but are simultaneously interested in upholding the reputation of the school and hence minimizing negative reputational consequences that would follow from a report of sexual violence on campus."
[74] *Id.*
[75] Karjane, H.K., Fisher, B.S., & Cullen, F.T., *Campus Sexual Assault: How America's Institutions of Higher Education Respond*. Final Report, NIJ Grant # 1999-WA-VX-0008. Newton, MA: Education Development Center, Inc. 105, 115 (2002).
[76] *Id.*
[77] Council of the Princeton University Community, Meeting Minutes (September 29, 2014) available at http://www.princeton.edu/vpsec/cpuc/minutes/9-29-14.pdf.
[78] Catherine E. Lhamon, Assistant Secretary for Civil Rights, Questions and Answers on Title IX and Sexual Violence 30 n. 30 (April 29, 2014). "Although Title IX does not dictate the membership of a hearing board, OCR discourages schools from allowing students to serve on hearing boards in cases involving allegations of sexual violence."
[79] CPUC Executive Committee, Letter to Members of the Council of the Princeton University Committee, Changes in Sex Discrimination and Sexual Misconduct Policy, 4. "OCR has taken the position that students may not play an adjudicatory role in sexual misconduct disciplinary proceedings. Under Princeton's past procedures, a subcommittee of the Faculty-Student Committee on Discipline (COD) adjudicated sexual misconduct cases. In our view this subcommittee operated with fairness and discretion, and the students and faculty members selected by their peers to participate on the subcommittee over the years served the University admirably and deserve our gratitude. But under OCR's interpretation of Title IX, students must be removed from participation in the disciplinary process."

panels. In the absence of student perspectives, faculty and administrators may find it hard to assess the reasonable person standard in the context of a college student. Cases that involve risky behavior associated with drug or alcohol abuse may particularly suffer without student input. Although disciplinary panels are not juries, removing students from such adjudicative bodies runs counter to the value of the jury of one's peers. Moreover, liberal arts institution that extoll the virtues of self-governance find the OCR guidance to be inconsistent with fundamental institutional ideals.[80]

Ultimately, student input is fundamental to a fair rape adjudication. OCR does not articulate why students are inappropriate arbiters for these adjudications, but one might assume it is to protect the privacy for both parties. Other protections could appropriately cabin student exposure. For example evidentiary rules that function like hearsay rules for sexual assault cases could limit sexual history evidence. Alternatively, schools that use a single investigator model, discussed below, might give a disciplinary panel factual findings for the panel to decide the final determination.

C. WHAT IS A SINGLE INVESTIGATOR?

The Task Force's "Not Alone" report extolls the "single investigator" model in school adjudications of sexual violence.[81] The model tasks a single trained investigator or investigative team to gather evidence, interview the parties and witnesses, and render a finding or

---

[80] Student Sexual Misconduct Policy, Executive Summary of Proposed Revisions for Public Comment, http://www.virginia.edu/sexualviolence/policy/ (last visited January 13, 2015).

> 13. Changes in Role of Sexual Misconduct Board. Under the Proposed New Policy, the role of the Sexual Misconduct Board ("SMB") will be limited to conducting Hearings on Sanctions. Recent OCR guidance discourages schools from allowing students to serve on hearing boards in cases involving sexual violence. This guidance is inconsistent with the University's tradition of student self-governance. Under the Proposed New Policy, the SMB will continue to include student members unless either of the parties objects, in which case the SMB Hearing Panel for that case will consist solely of faculty and staff members.

Id.

[81] *Not Alone*, *supra* note 16 at 14.

recommendation.[82] This recommended structure gives rise to two compliance concerns. First, this model – and the report's exuberance about innovative models – shows the breadth of acceptable forms of adjudication that would meet VAWA and Title IX standards without delineating boundaries.[83] Secondly, critics believe that abandoning an adversarial model will jeopardize the due process rights of the accused, as a single person serves all of the functions of judge, jury, and executioner.[84]

Many procedures fall under the single investigator umbrella so long as a single entity invesitgates both the victim and the accused.[85] Under these models, there is no hearing and therefore no cross-examination.[86] Single investigator models eliminate the traumatic cross-examination process for the victim and cut down on lengthy, academically disruptive hearings because students need only coordinate with the investigator rather than appear in front of the board for the duration of the hearing. The most fundamental and controversial difference among interpretations of this model is who decides the outcome. The University of Southern California's policy states that the assigned investigator will conduct interviews and appropriate

---

[82] *Id*.
[83] *Id*. "[T]he school's inquiry must in all cases be prompt, thorough, and impartial." *2011 Dear Colleague Letter*, *supra* note 39 at 5. The SaVE act uses substantially similar language, "Procedures for institutional disciplinary action . . . shall provide a prompt, fair, and impartial investigation and resolution." SaVE Act, *supra* note 22 at (iv)(I)(aa). The suggestion of a single investigator ignores the fact that SaVe mandates a procedure conducted by "officials" plural unless the statute means something specific and yet undefined by "conducted by." SaVE Act, *supra* note 22 at (iv)(I)(bb). "Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures . . . must meet the Title IX requirement of affording a complainant a prompt and equitable resolution." *2011 Dear Colleague Letter*, *supra* 39 note at 8.
[84] Michael Stratfortd, *Aggressive Push on Sexual Assault,* INSIDE HIGHER ED (Apr. 30, 2014), https://www.insidehighered.com/news/2014/04/30/white-house-calls-colleges-do-more-combat-sexual-assault (citing *Fire Responds to White House Task Force's First Report on Campus Sexual Assault* (Apr. 29, 2014), FOUNDATION OF INDIVIDUAL RIGHTS IN EDUCATION BLOG http://www.thefire.org/fire-responds-to-white-house-task-forces-first-report-on-campus-sexual-assault/). *See also* discussion on Due Process concerns, *infra* part II.4.
[85] Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCH PUB POL. & L. 211, 216 (examining research of litigant preferences for a single investigator model regardless of the guilt of the parties or whether the party is the defendant or plaintiff).
[86] *Not Alone*, *supra* note 18 at 14.

discovery before making a final determination of guilt and sanctions which may be appealed.[87] In contrast, Harvard's single investigator provides findings of fact to the university which then enters into a separate sanctions procedure.[88]

Schools that wish to adopt the single investigator model must balance efficiency and privacy interests against due process. Some recommendations for doing so include making investigators experienced sexual assault attorneys, separating the investigator's findings from university determinations of guilt and punishment (unlike USC), and allowing both the accuser and accused to appeal the final determination.[89]

D. How Should Universities Train their Disciplinary Boards?

Regardless of the composition and procedural role of the disciplinary board, its members must be trained.[90] Current guidance materials do not clarify the type of required training for the empanelled students, administrators, independent investigators, or other adjudicators, nor

---

[87] Student Conduct Code and Policies, §§ 17.02, 17.06, available at https://scampus.usc.edu/17-00-sexual-misconduct-and-discrimination-review-process/ (last visited January 12, 2015).

[88] Harvard University, *Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy*, http://diversity.harvard.edu/files/diversity/files/harvard_sexual_harassment_procedures_student.pdf, last modified July 1, 2014. Interestingly, Harvard's policy applies to the entire institutional population including faculty, staff, and students. Some professional organizations like ATIXA (Association of Title IX Administrators) promotes these kinds of universal policies to further interests of consistency and efficiency. *See* Model Policies, https://atixa.org/resources/model-policies/#unifiedprocess (last visited January 12, 2015).

[89] Shanlon Wu, *Improving Campus Sexual Assault Investigations: Will Independent Investigators Help or Hurt?,* Washington Post, http://www.huffingtonpost.com/shanlon-wu/improving-campus-sexual-assault_b_5516402.html (June 21, 2014, 3:03 pm, updated August 21, 2014, 5:59 am).

[90] Procedures must be "conducted by officials who receive annual training on the issues related to domestic violence, sexual assault, and stalking, and how to conduct an investigation and hearing process that protects the safety of victims and promotes accessibility." SaVE Act, note 22 at (k)(2)(ii) as amended Oct. 20, 2014. The Office of Civil Rights has not articulated a requirement to train adjudicators, only those "with the authority to address harassment." *Dear Colleague Letter*, *supra* note 43 at 4. The Not Alone report promoted a training program created by the Justice Department's Center for Campus Public Safety for school officials and investigators beginning September 2014. *Not Alone*, *supra* note 18 at 13. The Trauma-Informed Sexual Assault Investigations and Adjudications training has been delayed but should begin roll-out in November 2015. Training & Technical Assistance, The National Center for Campus Public Safety, http://nccpsafety.org/technical-assistance-training (last visited Oct. 19, 2014).

whether training should be monolithic or tailored to the age, role, and experience of the person.[91] Nor does the law address the costs associated with providing extensive and multiple trainings to different campus populations.[92] Instead, the Department of Education suggests schools cut associated training costs for judicial board members by working with rape crisis centers and State sexual assault coalitions to formulate trainings.[93] This tone deaf suggestion does not account for the low staffing and funding of such crisis centers.

Training must also address that the board is a hybrid of judge and jury. Unlike in a court, where a judge enforces procedure and jury compliance,[94] disciplinary board members must know university policy and self-police their adherence. This is a particularly daunting task for issues of self-incrimination in which a student's silence may or may not be evidence of guilt.[95] Board members who know only of pop-culture legal touchstones may not understand procedures that differ or even adhere to their preconceived notions. Advocates for the accused worry that training the board may serve to bias the board against the accused.[96] Although the backlash about training begins to look like starkly gendered men's rights activism,[97] more nuanced arguments about professional jurors may serve as a useful corollary to discuss pitfalls of a

[91] Violence Against Women Act, 79 Fed Reg. 62,752, 62773 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668).
[92] Trainings are required for all incoming students, new faculty and staff. Trainings should be ongoing and tailored to the given audience. *See infra* part (II)(1)(E) on training.
[93] Violence Against Women Act, 79 Fed Reg. 62,752, 62773 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668).
[94] The Department of Education parses the difference between Title IX compliance and Clery Act requirements; whereas the 2011 Dear Colleague Letter articulated an evidentiary standard, Clery compliance only requires that the institution's own published proceedings are followed. *See id.* at 62,772; SaVE Act at (k)(i)(B)(1).
[95] Paul E. Rosenthal, Symposium Paper: *Telecommunications law: Unscrambling the Signals, Unbundling the Law: Note: Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1278 (1997).
[96] Henrick, *supra* note 49 at 62 (2013) (discussion of National Center for Higher Education Risk Management).
[97] *See generally*, Accusing U., STOP ABUSIVE AND VIOLENT ENVIRONMENTS, http://www.saveservices.org/falsely-accused/sex-assault/accusing-u/ (last visited Oct. 19, 2014).

trained board.[98] On the other hand, the collective knowledge about respondent rights are greater than the knowledge about sexual abuse victims and thus training serves to recalibrate this imbalance.[99] Similarly, implementing the preponderance of the evidence standard according to OCR regulation requires retraining judicial board members to use a less well-known and less clear standard. In order to supplement the unarticulated training for judicial board members, schools should require at least one trained lawyer to be on the tribunal of each hearing to correct misperceptions and interpret legal standards in addition to her role as fact-finder.

E. WHAT IS THE APPROPRIATE STUDENT AND FACULTY TRAINING?

The October 20th final rules confirm the broad discretion that VAWA gives to colleges and universities to train their incoming faculty, staff, and students.[100] The required training should, but not must, address the social context of sexual violence and be socially relevant to the group attending.[101] The law does not require the use of research in the trainings nor does it mandate attendance by students or employees. This flexible content and attendance policy relieves some of the university's burden to comply, but in turn strips the power and purpose of the training requirement.[102] The amendments to Clery do not require trainings to be in person, however administering such trainings on the computer may result in unwanted triggering for

[98] Two principles are in conflict in this discussion of profession jurors. A core assumption of jury trials is that jurors decide guilt based on the evidence at trial. On the other hand, jurors are not blank slates either; they naturally use their experiences and knowledge in their decision-making. Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POLICY REV. 239, 241–42. Notably, one concern that professional jurors might have an air of authority to persuade other jurors is not present in university adjudication as all members of a judicial board must be trained. *See id.* at 270.

[99] Conversation with Mary Beth Grant, Cornell University Title IX Coordinator. While average students, administrators, and faculty members who may serve in a judicial capacity may be familiar with rights against self-incrimination or proof beyond a reasonable doubt from television and movies, fewer have the same familiarity with battered women's syndrome or the way trauma may affect memory or verbal recall. Training to rebalance board knowledge and bias will inherently seem complainant-focused because the collective knowledge of the public may already by respondent-focused.

[100] Violence Against Women Act, 79 Fed Reg. 62,752, 62,758 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668).

[101] *Id.*

[102] These rules only create the minimum programmatic requirements. The comments to the rules encourage but do not require institutions to make the programming mandatory for employees and new students. *Id*. at 62,770.

sexual assault survivors who would ostensibly view this material at home alone rather than in the responsive community environment of an in-person training. Lastly, just as training for disciplinary board members draws criticism for pro-accuser bias, so too does third-party involvement in creating the content of these required training sessions.[103] The law explicitly allows for content from third party training vendors, so long as their programming meets the definition of a "program[] to prevent dating violence, domestic violence, sexual assault, and stalking."[104]

A fuller, more nuanced set of guidelines or age- and gender-specific scripts created by the DOE could alleviate the cost and variation issues with training. A standardized training, however, may strip context and culture from the presentation and diminish university and student buy-in.

3. Privacy Interests at Odds with University Adjudication

The Family Educational Rights and Privacy Act (FERPA),[105] in relevant part, allows students to view their own education record and limits when institutions may share records without student consent.[106] The law applies to institutions that receive federal money, including student financial aid.[107] Non-compliance with FERPA theoretically results in the denial of federal money, though no school has ever been so punished.[108] The comments to the VAWA

[103] *See* Henrick, *supra* note 49 at 64 (criticizing the head of the National Center for Higher Education Risk Management, Brett Sokolow, in his role in drafting model trainings).
[104] Violence Against Women Act, 79 Fed Reg. 62,752, 62,759 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668).
[105] 20 U.S.C. § 1232g (2013).
[106] *Id.* For a summary of FERPA, *see* Ethan M. Rosenzweig, *Please Don't Tell: The Questions of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 451–52 (2002).
[107] 20 USCS § 1232g(a)(3); Stephanie Humphries, *Institutes of Higher Education, Safety Swords and Privacy Shields: Reconciling Ferpa and the Common Law*, 35 J.C. & U.L. 145, 153 (2008).
[108] 20 USCS § 1232g(c)(f); Humphries, *supra* note 108 at 158.

reauthorization explicitly prioritize reporting over student privacy.[109] A school does not per se violate student privacy by reporting incidents of assault and outcomes of trials because Clery reporting does not contain the names of the victims and accused.[110] Even after this clarification, there is still an open question about student records in the context of judicial procedures.

There are two competing interests in this aspect of school proceedings: the educational value of open discourse in confidential conduct hearings on the one hand and the need for full evidentiary access in order to fairly adjudicate student crime on the other.[111] FERPA may undercut judicial tactics by revealing evidence prepared by either party in advance of a hearing. Under FERPA rules, students may request their own educational record, which could include evidence collected against them in ongoing adjudications. The school may redact certain information, but the privacy and confidentiality of witnesses may still be compromised.

FERPA also limits information that may be revealed or used during the adjudication process.[112] A party to the dispute may wish to look at a student's past record as part of discovery but such access would be against the privacy law. The law contains an exception that allows schools to share information in emergencies.[113] A student cannot successfully claim that letting an alleged rapist stay on campus is a health risk that warrants this exception. Emergencies are

---

[109] "…[C]ompliance with these provisions does not constitute a violation of . . . the Family Educational Rights and Privacy Act of 1974 (FERPA)." Violence Against Women Act, 79 Fed Reg. 62,752, (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668). The reported result of the school investigation "means any initial, interim, and final decision . . . . The result must include any sanctions imposed by the institution. Notwithstanding . . . the Family Educational Rights and Privacy Act . . . Compliance with paragraph (k) of this section does not constitute a violation of FERPA." *Id.* a 62789.

[110] Violence Against Women Act, 79 Fed Reg. 62,752, 62,758 (Dep't of Educ. October 20, 2014) (to be codified at 34 C.F.R. pt. 668(b)). The annual security report requires the university to report statistics and give the campus timely warnings of crimes on campus. Neither of these requirement implicate FERPA as they do not depend on the education records of students themselves nor do they inherently divulge the identities of victims or the accused.

[111] Ethan M. Rosenzweig, *Please Don't Tell: The Questions of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 449 (2002).

[112] Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 505 (2012).

[113] Katrina Chapman, *A Preventable Tragedy at Virginia Tech: Why Confusion Over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349 (2009).

defined in connection with the health and safety of other students.[114] The emergency exception is construed narrowly to be invoked only in exceptional circumstances.[115] Even if the emergency is exceptional, schools may only release information to appropriate individuals.[116] Therefore, a student claiming that letting a rapist stay on campus is a health risk could not use a FERPA exception to view the accuser's file in school adjudication.

While FERPA protects records created for school proceedings, criminal subpoenas trump FERPA.[117] Thus, any statements made in the course of a disciplinary proceeding may be seen by the prosecutors in future or concurrent criminal proceedings. This is one reason why commentators believe attorneys should be present at school adjudications to safeguard procedural protections for the accused.[118] Moreover, the campus judicial proceeding is focused on education, growth, and reconciliation, thus encouraging student participants to be forthright.[119] When a subpoena can breach the privacy of these proceedings, the educational interest in the campus proceeding is compromised as students fear criminal repercussions for their honesty. This is not to say that students guilty of assault should not be punished to the full extent of criminal law, but rather the two alternative tracks should remain separate to protect their competing goals.

Outside of the scope of FERPA, other privacy interests are at stake in student adjudications. Under OCR guidance, schools must pursue and remedy all reports of sexual

---

[114] 20 U.S.C. § 1232g(b)(1)(I) (2013).
[115] Stephanie Humphries, *Institutes of Higher Education, Safety Swords and Privacy Shields: Reconciling Ferpa and the Common Law*, 35 J.C. & U.L. 145, 159 (2008).
[116] 20 U.S.C. § 1232g(b)(1)(I) (2013).
[117] Chapman, *supra* note 114 at 451 citing Pub. L. No. 103–382, 108 Stat. 3518 (1994) (codified as amended at 20 U.S.C. 1232g(b)(1)(J)(1994).
[118] Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653 at 691 (2001); *See generally* Paul E. Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Hearings*, 97 COLUM. L. REV. 1241 (1997).
[119] *Id.* at 472.

violence.[120] This mandate does not give flexibility for victims who do not wish to pursue a full hearing or institutional response.[121]

4. Due Process Concerns

Scholars,[122] advocates,[123] and students[124] are engaged in lively debate about the due process ramifications of the OCR guidance documents. First, public and private institutions are held to different standards.[125] While students enrolled in public universities possess limited procedural due process rights,[126] private school students are constitutionally protected only when adjudication procedures are fundamentally unfair.[127] Instead, contract law, premised in part on published policies and student manuals, provides the basis for procedural protections for private school students.[128] Because Clery requires institutions to publish reporting and disciplinary procedures, private school students may now have greater leverage to hold schools accountable for process rights through contract claims.[129] Under this contract model, however, it is unclear whether students are bound by policies and procedures even if the school makes unilateral changes to the bulletin without notice.[130] Moreover, students entering such contracts are inherently unequal to universities in knowledge and power.[131]

---

[120] *2011 Dear Colleague Letter*, *supra* note 39 at 4.
[121] Kelderman, *supra* note 1.
[122] *See generally infra* section II. 4.
[123] *See* Chmielewski, *supra* note 9 at 145–46 n.12–15 (2013).
[124] *See e.g.*, Triplett, *supra* note 112.
[125] 3-8 EDUCATION LAW § 8.01(5)(c)(i) (Matthew Bender, & Co., 2014). For additional comparison between the rights afforded public versus private schools university students, *see* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 290–91 (1999).
[126] Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1621–23 (2012) (describing the evolution of case law granting post-secondary students due process in disciplinary proceedings).
[127] Triplett, *supra* note 112.
[128] Berger, *supra* note 125 at 321.
[129] *See supra* part I. (regarding published procedures under Clery).
[130] *See* Berger, *supra* note 125 at 321 (categorizing student contracts with universities as contracts of adhesion).

> "…[T]he likelihood that upper-class students will have looked at the revised bulletin, or even have received or seen a copy, is far smaller than for incoming freshman. Many schools do not routinely provide incumbent students with copies of the revised bulletin, and many students, now 'seasoned veterans,'

Under OCR guidance, both public and private institutions are held to the same mandates, including the preponderance of the evidence standard.[132] The preponderance of evidence standard is consistent with other civil rights adjudication and is the standard used by OCR in their own investigations.[133] On the other hand, the punitive nature of these university proceedings may require heightened process more akin to a criminal proceeding.[134] In fact, the two-track system of campus adjudications alongside criminal proceedings highlights their differences and the zero-sum nature of their protections.[135] Each system prioritizes due process against victim protections differently so that the two are inverses of each other, rather than procedural mirrors. For example, the protections given to a victim by eschewing the adversarial model[136] run counter to the accused student's procedural protections if given the right to cross examine.[137] For now, however, the common understanding is that there is no due process right to cross-examination in a school adjudication.[138]

---

depend even more heavily on word-of-mouth advice from faculty and friends than upon the printed word . . . ."

[131] *See id.* ("One other factor heightens the bargaining inequality of the two parties: the typical student's youth. Barely post-adolescent, she is leaving her parents' protective shelter for the first time.").

[132] *2011 Dear Colleague Letter*, *supra* note 39.

[133] *See* Chmielewski, *supra* note 9; section II. A.

[134] See KLINTON W. ALEXANDER & KERN ALEXANDER, HIGHER EDUCATION LAW: POLICY AND PERSPECTIVES 180 (1st ed. 2010). In keeping with the reasoning in *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961), as the potential penalty for students increases, the procedural protections should increase as well.

[135] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions of Campus Sexual Assault*, 84 B.U.L. REV. 945, 988–89 (2004). Campus proceedings do not subject the victim to publicity or emotional trauma. Campus adjudication is in a more familiar environment than a courthouse. Institutional remedies and punishments may be more flexible. "Finally and most importantly, the criminal justice system, with its standard of proof guilt beyond a reasonable doubt, rarely provides relief to acquaintance rape victims, so a campus disciplinary proceeding may appear to be a more advantageous avenue of potential relief." Language like this suggest that the campus process is rigged against the accused, when many would argue this alternative forum merely provides a counterweight to the criminal justice system which is hostile to victims. *See* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L REV. 1553, 1558 (2014).

[136] *See supra* part (II)(1)(C).

[137] *See* Tenerowicz, *supra* note 118 at 690.

[138] Triplett, *supra* note 112 at 501 (noting the courts are split on whether cross-examination in campus adjudications are part of due process obligations, referring to one outlier, Donohue v. Baker, 976 F. Supp. 136 (N.D.N.Y. 1997), in which cross-examination was ruled necessary for due process).

The VAWA reauthorization does not require schools to provide an appeals process.[139] Even if schools provide the right of appeal, institutions vary in whether to provide a full record or written decision that sets forth reasoning from which to appeal.[140] Without written reasoning or a full record of the hearing, students have little actual protection through the appeal process.[141] In a 2002 study of school responses to sexual assault, about 60% of schools with a written disciplinary procedure provided an appeals process.[142] Some scholars and practitioners worry that allowing appeals will subject the accused to double jeopardy.[143] Because OCR Title IX guidance requires procedural parity between the accuser and accused, if an accused student has the right to appeal, so must the complainant.[144] If a complainant appeals an institution's decision, the accused must defend himself anew.[145]

The Department of Education dismisses some of these due process concerns by comparing the Clery legislation to the minimums of due process.[146] Minimums of due process are notice of the charges against the accused, the names of witnesses, the opportunity to present a defense, and notice of the final determination.[147] Although federal courts have interpreted the minimums of due process in student disciplinary hearings in a variety of ways, two principles anchor the case law: the notice and hearing requirement[148] and the hearings do not need to mirror

---

[139] 79 Fed Reg. 62,752, 62,774. The 2011 OCR Dear Colleague Letter does recommend the right to appeal. 2011 *Dear Colleague Letter*, *supra* note 39 at 12.
[140] Berger, *supra* note 125 at 299.
[141] *Id.*
[142] Karjane, H.K., Fisher, B.S., & Cullen, F.T., *Campus Sexual Assault: How America's Institutions of Higher Education Respond*. Final Report, NIJ Grant # 1999-WA-VX-0008. Newton, MA: Education Development Center, Inc. 105 (2002).
[143] Open Letter to OCR from FIRE Coalition (May 7, 2012), available at http://www.thefire.org/open-letter-to-ocr-from-fire-coalition/ [Hereinafter *FIRE Letter*].
[144] *2011 Dear Colleague Letter*, *supra* note 39 at 12.
[145] *FIRE Letter*, *supra* note 143.
[146] 79 Fed Reg. 62,752, 62,772.
[147] Berger, *supra* note 125 at 306–07, citing *Dixon*, 294 F.2d at 157.
[148] *See* Alexander, *supra* note 134 at 180–82; Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 77 (2013); Weizel, *supra note 126* at 1624.

court trials.[149] Here, the VAWA reauthorization sets the procedural bar by mandating that (1) proceedings be fair, prompt, and impartial,[150] (2) both parties have equal access to advisors,[151] and (3) trained officers conduct proceedings.[152] An interest-balancing approach to due process also confirms the adequacy of the preponderance standard.[153] While this is a controversial outgrowth of the OCR documents, due process litigation by accused male students has largely been settled or resulted in new school hearings.[154] In some cases, courts "remand" back to a new university trial, showing a willingness to keep the two track system and faith in the due process protections afforded by institutions of higher education.

III. POLITICAL LANDSCAPE FOR FUTURE CHANGES TO CAMPUS SEXUAL ASSAULT LAW

Campus sexual assault is gaining traction as a bipartisan issue.[155] Senator Claire McCaskill has proposed the Campus Accountability and Safety Act (CASA), an amendment[156] to the Clery Act requiring colleges to complete surveys on sexual violence in an attempt to

---

[149] Weizel, *supra* note 126 at 1628.
[150] 34 C.F.R. pt. 668(k)(2)(i).
[151] 34 C.F.R. pt. 668(k)(2)(iii), These advisors may be attorneys, however, may restrict the role of these advisors so long as the restrictions apply equally to both parties. While the statute requires schools to provide information about victim advisors, there is no parallel requirement to provide the accused with similar information. VAWA 79 Fed Reg. 62,752, 62,773–74. Indeed, a survey of 200 institutions of higher education shows that almost 90% of policies allow advisors in proceedings though only 58% allow attorneys. Berger, *supra* note 125 at 297 . The absence of an attorney in this non-criminal proceeding does not abridge due process. *See id.* at 339; *but see* Triplett, *supra* note 112 at 502 (citing *Furey v Temple Univ.*, 730 F.Supp 2d 380 (E.D. Pa. 2010) (holding a student facing expulsion is entitled to legal counsel)).
[152] 34 C.F.R. pt. 668(k)(2)(ii).
[153] Weizel, *supra* note 126 at part B.
[154] Database of Lawsuits Against Colleges and Universities Alleging Due Process and Other Violations in Adjudicating Sexual Assault, http://www.avoiceformalestudents.com/list-of-lawsuits-against-colleges-and-universities-alleging-due-process-violations-in-adjudicating-sexual-assault/ (last visited January 7, 2015).
[155] The bipartisan Committee on Heath, Education, Labor & Pensions (HELP) held a hearing on campus sexual assault on June 26,2014. The committee is lead by Tom Harkin and Lamar Alexander (R-TN). Full Committee Hearing – Sexual Assault on Campus: Working to Ensure Student Safety (June 26, 2014, 10:00 am), available at http://www.help.senate.gov/hearings/hearing/?id=0b51c18f-5056-a032-5268-c16c292050b5. Alexander voted in favor of the VAWA Reauthorization Act of 2013. Final Vote Results for Roll Call 555, (Feb. 28, 2013, 11:56 am) available at http://clerk.house.gov/evs/2013/roll055.xml. Still, Alexander remains a proponent of laissez faire education policy so that universities are not burdened by federal mandates regarding sexual violence. Kimberly Hefling, Ed Official: Some Campuses Still Hostile to Sexual Assault Survivors, HUFFINGTON POST (June 26, 2014) available at http://www.huffingtonpost.com/2014/06/26/campus-sexual-assault-education-department_n_5534173.html.
[156] Campus Accountability and Safety Act, S.2692 (July 30, 2014) available at https://www.congress.gov/bill/113th-congress/senate-bill/2692/text.

address inconsistencies in reporting.[157] The stigma of public statistics means campuses may discourage student reporting; this bill attempts to remove stigma and encourage school transparency.[158] The bill has bipartisan support in the senate[159] after McCaskill reached out to Senator Lamar Alexander, ranking republican member of the Health, Education, Labor & Pensions committee (HELP).[160] Eighteen house members from both sides have co-sponsored an analogous bill in the house. [161]

The climate survey bill appears to be a direct outgrowth of the Task Force recommendations: "The first step in solving a problem is to name it and know the extent of it . . . we urge schools to show they're serious by conducting the survey [in the 2015-2016 academic year] . . . and at the end of this trial period we will explore legislative or administrative options to require schools to conduct a survey in 2016."[162] These would best serve prospective students in gauging safe, responsive, and supportive educational environments, and place increased pressure on institutions, in the form of application rates, to conform not only to federal requirements but normative best practices. High overhead costs prevent institutions from independently and

---

[157] Lucia Graves, *Why Some Schools Should Celebrate Being at the top of Reported Campus Rape Lists*, NAT'L J., (Aug. 1, 2014). This proposal tracks with the recommendations issued by the Task Force. *Not Alone*, *supra* note 18.

[158] Under the Clery Act, colleges must publish an annual security report detailing the crimes reported during the past three years as well as procedures and policies in place to combat incidents. *Supra* note 32.

> Each college and university now has a choice: nervously guard its reputation at the profound expense of student well-being or courageously invest in student safety, health and education. College campuses need to know what they are fighting. Enabling the methodical collection of data — and encouraging their transparent distribution and study — will signal to campus communities across the country that institutional betrayal can be replaced by institutional courage.

Jennifer J. Freyd, *Official campus statistics for sexual violence mislead*, AL JAZEERA (July 14, 2014, 6:00 AM), http://america.aljazeera.com/opinions/2014/7/college-campus-sexualassaultsafetydatawhitehousegender.html.

[159] Freyd, *supra* note 158.

[160] Nick Anderson, *Congress Explores Proposals to Combat Sex Assault on Campus*, WASHINGTON POST (June 26, 2015), http://www.washingtonpost.com/local/education/congress-explores-proposals-to-combat-sex-assault-at-colleges/2014/06/26/3b7df0c0-fd30-11e3-8176-f2c941cf35f1_story.html.

[161] Press Release: Reed Looks to Curb Sexual Assault on College Campuses (August 11, 2014), http://reed.house.gov/press-release/reed-looks-curb-sexual-assault-college-campuses.

[162] *Not Alone*, *supra* note 18 at 2, 7 noting that climate surveys circumvent the issue of underreporting and will remove the stigma of schools with high reporting numbers. "When a school tries to tackle the problem – by acknowledging it, drawing attention to it, and encouraging survivors to report – it can start to look like a dangerous place. On the flip side, when a school ignores the problem or discourages reporting (either actively or by treating survivors without care), it can look safer."

voluntarily undertaking such studies.[163] Several interest groups are currently developing surveys which may be able to collect baseline data with enough participation as to spread costs effectively.[164] The cheaper the study, however, the less depth of the data, and the less positive reinforcement schools will have for implementing unquantifiable programs aimed at shifting the culture of the institution.

In addition to cost concerns and outsourcing climate surveys, there are additional problems with the proposed survey timelines and data processing. Requiring annual surveys leaves little time to analyze data and implement changes before a new survey is due. Mandating yearly assessment prevents schools from meaningfully responding to new data. Instead, schools assess new programs and initiatives at a fledgling stage before real measurable improvement can be shown. By the Department of Education's own admission, there is very little data about what programs designed to prevent sexual violence are effective.[165] It may be too early to codify such best practices into law, thereby removing the incentive to experiment or have context-contingent policies. This is especially true for the new OCR guidance and Clery reporting requirements, which do not go into full effect until the 2015-2016 academic year. Students will not receive a full college education under these guidelines under 2017 for associate's degrees or 2019 for four year degrees.

---

[163] The Association of American Universities (AAU) endorses one climate survey that costs approximately $85,000. Letter from Hunter Rawlings to AAU Presidents and Chancellors, November 14, 2014.

[164] *See e.g.*, AAU Announces Sexual Assault Climate Survey, https://www.aau.edu/news/article.aspx?id=15696; Letter from Rutgers University Student Affairs Re: Campus Climate Assessment Pilot Updates (July 29, 2014), *available at* http://president.uoregon.edu/sites/president1.wc-sites.uoregon.edu/files/field/image/Rutgers%20Letter%20-%20Campus%20Climate%20Assessment%20Pilot_1.pdf.

[165] 79 Fed Reg. 62,752, 62,758 "There is a relative lack of scientific research showing what makes programs designed to prevent dating violence, domestic violence, sexual assault, and stalking effective."

On the state level, laws regarding affirmative consent on college campuses are changing the way in which schools define rape.[166] Affirmative consent means that the participants have verbally agreed to sexual contact. [167] California amended its education code to use affirmative consent when deciding whether the complainant consented to sexual activity. [168] This law applies to all schools that receive California state funds for student financial aid.[169] Similarly Andrew Cuomo directed the public universities in the State University of New York (SUNY) system to adopt affirmative consent standards. [170] One crucial difference between the New York and California policies is their extension of amnesty to students who report sexual assault. The California legislation offers disciplinary amnesty to students who are complainants or witnesses in a sexual assault complaint with an exception if the student violation was egregious or endangered other people.[171] The New York amnesty policy does not provide for such an exception.[172] The SUNY policy, then, trades increased reporting for the ability of the university to change the behavior of its students. For example, a New York fraternity that reports a rape under this law would be immune from discipline over binge drinking or degrading practices which provided the context for the assault. New York Governor Andrew Cuomo is seeking to make the SUNY policy state law without addressing this amnesty issue.[173]

IV. CONCLUSION: WHAT IS AT STAKE FOR UNIVERSITIES?

[166] CA EDUC. CODE § 67386 (Sept 28, 2014); see also Michael Stratford, Campus Sex Assaults Draw State Scrutiny, Inside Higher Ed, https://www.insidehighered.com/news/2014/08/28/federal-scrutiny-campus-sexual-assaults-spills-states (August 28, 2014).
[167] According to the California legislation, affirmative consent requires "affirmative, conscious, and voluntary agreement to engage in sexual activity." CA EDUC. CODE § 67386 (Sept 28, 2014)
[168] *Id.*
[169] *Id.*
[170] Memorandum from Nancy L. Zimpher, Sexual Assault Response & Prevention (Oct. 2, 2014), available at http://www.suny.edu/media/suny/content-assets/documents/boardoftrustees/memos/Sexual-Assault-Response-Prevention-REVISED.pdf
[171] CA EDUC. CODE § 67386(b)(10) (Sept 28, 2014).
[172] Zimpher, *supra* note 170. Although the example given specifically states "minor alcohol or drug infractions," the law does not delineate whether greater infractions would vitiate immunity.
[173] Press Release Re: Codifying Comprehensive, Uniform Sexual Assault Policy on College Campuses (January 17, 2015), https://www.governor.ny.gov/news/2015-opportunity-agenda-ensuring-justice-perception-and-reality.

Institutions have real financial incentives to comply with VAWA and Title IX. These financial incentives flow less from government enforcement than the commodification of higher education. At this time, no school has ever lost funding for noncompliance with Title IX.[174] Similarly, the Department of Education routinely and significantly discounts penalties for reporting violations.[175] Instead, the threat of these penalties, the spectre of student litigation, and the potential reputational harm of noncompliance ought to push institutions toward overcautious compliance and best practices.

Though litigation is rare, several schools have settled with accused students who brought contract, intentional infliction of emotional distress, and due process actions against them.[176] In 2011, an accused student sued the University of the South (Sewanee) for breach of Title IX and Clery.[177] Although the federal claims were dismissed, the court awarded the plaintiff $26,500 and a tuition refund for breach of contract and negligence claims.[178] These private rights of action are different from the suits students may chose to bring to the Department of Education. Indeed, Students and an administrator at the University of North Carolina at Chapel Hill brought a panoply of federal allegations in their complaint to the Department of Education for violations of Campus Sexual Assault Victims' Bill of Rights, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, the Family Educational Rights and Privacy Act, Title IX of the Education Amendments of 1972, the Civil Rights Act of 1964, and the

---

[174] WHAT IS TITLE IX?, Sadker.org/TitleIX (last visited January 15, 2015).
[175] Michael Stratford, *Clery Fines: Proposed vs. Actual*, INSIDE HIGHER ED (July 17, 2014), https://www.insidehighered.com/news/2014/07/17/colleges-often-win-reduction-fines-federal-campus-safety-violations
[176] See *Database*, *supra* note 154 (citing settlements at Denison, DePauw, Brown, Swarthmore, and Xavier). *See also* Allie Grasgree, *Going on Offense with Title IX*, INSIDE HIGHER ED (August 9, 2013), https://www.insidehighered.com/news/2013/08/09/accused-rape-men-allege-discrimination-under-title-ix.
[177] Doe v Univ. of the S., 687 F. Supp. 2d 744 (ED Tenn 2009).
[178] Doe v. Univ. of the S., 2011 U.S. Dist. LEXIS 35166 (E.D. Tenn. Mar. 31, 2011). See also Allie Grasgreen*, New Scrutiny for Sex Assault Cases*, INSIDE HIGHER ED. (September 6, 2011), https://www.insidehighered.com/news/2011/09/06/new-scrutiny-sex-assault-cases.

Americans with Disabilities Act.[179] The action stemmed from alleged pressure from the University to underreport incidents of sexual assault. [180]

Colleges and universities that appear on the Not Alone list of schools not in compliance[181] must convince prospective students, and their protective parents, to apply despite the negative press. Recently, schools in New York report that they never received notice from OCR before appearing on the list.[182] Moreover, the president of Tufts University insinuated that disconnect between the regional offices and national OCR office leaves schools confused about their status with the agency.[183] Given this breakdown in communication, schools may chose to stringently self regulate rather than run afoul of OCR without notice.

Of course implementation itself is costly. The trainings for both adjudicators and the school community at large present an economic hurdle.[184] No compliance cost, however, would be worth the public relations nightmare of stating publically that financial barriers prevented student safety. As lawmakers and the Department of Education continue to wrestle with VAWA and Title IX, there is hope to overcome ambiguous mandates and due process issues. As new

---

[179] Andy Thomason & Caitlin McCabe, Complaint: *UNC Pressured Dean to Underreport Sexual Assault*, DAILY TARHEEL (January 17, 2013, 11:07 p.m.), http://www.dailytarheel.com/article/2013/01/50f8ca9bc71da.

[180] *Id.*

[181] As part of the government commitment to transparency, the new Not Alone website publishes an interactive map of all schools with Title IX resolutions (not open investigations) and Clery reporting violations. NOT ALONE, https://www.notalone.gov/data/ (last visited January 15, 2015).

[182] Neither Hamilton College nor Suny Purchase had received word about investigations before the list was posted. Jessica Bakeman, *11 N.Y. Colleges Investigated for Handling of Sexual Assault*, CAPITAL Jan. 12, 2015 5:33 a.m. http://www.capitalnewyork.com/article/albany/2015/01/8559889/11-ny-colleges-investigated-handling-sexual-assault.

[183] "At issue, says Monaco, is a disconnect between OCR's regional office in Boston and national office in Washington D.C. He said Tufts administrators were under the impression from the regional OCR staff that Tufts would be found noncompliant in previous cases they had examined but that recent changes to school policies would have brought it into compliance." Rachel Axon, *Tufts University Disputes Feds' Noncompliance Claim*, USA TODAY (April 29, 2014 9:34 p.m.) http://www.usatoday.com/story/news/nation/2014/04/29/tufts-university-office-for-civil-rights-sexual-assault/8490931/ (referring to the withdrawal of cooperation by the university's president. http://oeo.tufts.edu/sexualmisconduct/tufts-reaffirms-commitment-to-title-ix-compliance/); *see also* Update on Sexual Misconduct Prevention (April 28, 2014) http://president.tufts.edu/2014/04/update-on-sexual-misconduct-prevention/ (recommitting to Tufts' cooperation with the OCR investigation); Sarah Lipka, *Revived Title IX Agreement with Tufts Signals Stricter Enforcement*, CHRON. HIGHER EDUC. (May 12, 2014), http://chronicle.com/article/Revived-Title-IX-Agreement/146501/.

[184] Kelderman, *supra* note 1.

laws shift campus sexual assault policies away from Clery-esque consumer protection and toward comprehensive reform, schools should have better tools, evolving cultural buy-in from students, and legal uniformity to remove many of the barriers.